

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK**

THE CITY OF NEW YORK

Plaintiff,

v.

OLD DOMINION TOBACCO COMPANY,
INCORPORATED d/b/a ATLANTIC
DOMINION DISTRIBUTORS,

Defendant.

Case No. 1:20-cv-05965

**AFFIRMATION OF
MARY GRACE W. METCALFE IN
SUPPORT OF DEFENDANT’S
MOTION REGARDING THE
INSUFFICIENCY OF PLAINTIFF’S
PRIVILEGE LOG AND TO COMPEL
PRODUCTION**

I, Mary Grace W. Metcalfe, an attorney duly admitted to practice law before the courts of the State of New York, affirms the following to be true under the penalties of perjury.

1. I am associated with the law firm Troutman Pepper Hamilton Sanders LLP, attorneys for Defendant Old Dominion Tobacco Company, Inc. d/b/a Atlantic Dominion Distributors (“Atlantic Dominion”) in this matter.

2. I submit this affirmation in further support of Atlantic Dominion’s motion regarding the insufficiencies of the privilege log circulated by Plaintiff the City of New York and to compel production.

3. Attached hereto as Exhibit A is a true and correct copy of the privilege log the City circulated on February 17, 2023, which was the second privilege log circulated by the City in this case (the “Second Privilege Log”).

4. During the conference before this Court on June 7, the City indicated that it did not intend to update its privilege log any further.

5. Attached hereto as Exhibit B is a true and correct copy of a revised privilege log provided by the City on June 14, 2023 (the “Third Privilege Log”).

6. On June 15, the City produced 25 documents which had been listed on the Second Privilege Log but over which the City was no longer asserting privilege.

7. The Third Privilege Log contains 170 entries. The descriptions for the following 95 entries identify the withheld document as “Communication (email chain)” without identifying how many emails are within the chain, the dates they were sent, the various senders or recipients, or whether the individual emails contained any attachments:

- | | | |
|-------------------------|-------------------------|-------------------------|
| 1) DMNL00241_000006131 | 22) DMNL00241_000010121 | 43) DMNL00241_000013325 |
| 2) DMNL00241_000006133 | 23) DMNL00241_000010204 | 44) DMNL00241_000013336 |
| 3) DMNL00241_000006147 | 24) DMNL00241_000010242 | 45) DMNL00241_000013458 |
| 4) DMNL00241_000006151 | 25) DMNL00241_000010266 | 46) DMNL00241_000013471 |
| 5) DMNL00241_000006156 | 26) DMNL00241_000010305 | 47) DMNL00241_000013480 |
| 6) DMNL00241_000006160 | 27) DMNL00241_000012366 | 48) DMNL00241_000013496 |
| 7) DMNL00241_000006166 | 28) DMNL00241_000012417 | 49) DMNL00241_000013540 |
| 8) DMNL00241_000006176 | 29) DMNL00241_000012702 | 50) DMNL00241_000013572 |
| 9) DMNL00241_000006183 | 30) DMNL00241_000012735 | 51) DMNL00241_000013578 |
| 10) DMNL00241_000006252 | 31) DMNL00241_000012820 | 52) DMNL00241_000013587 |
| 11) DMNL00241_000006255 | 32) DMNL00241_000012879 | 53) DMNL00241_000013770 |
| 12) DMNL00241_000006277 | 33) DMNL00241_000012896 | 54) DMNL00241_000013798 |
| 13) DMNL00241_000006309 | 34) DMNL00241_000012897 | 55) DMNL00241_000013816 |
| 14) DMNL00241_000006311 | 35) DMNL00241_000012900 | 56) DMNL00241_000013823 |
| 15) DMNL00241_000006314 | 36) DMNL00241_000013144 | 57) DMNL00241_000013833 |
| 16) DMNL00241_000006318 | 37) DMNL00241_000013191 | 58) DMNL00241_000013840 |
| 17) DMNL00241_000006347 | 38) DMNL00241_000013208 | 59) DMNL00241_000013845 |
| 18) DMNL00241_000006376 | 39) DMNL00241_000013220 | 60) DMNL00241_000013847 |
| 19) DMNL00241_000006378 | 40) DMNL00241_000013225 | 61) DMNL00241_000013850 |
| 20) DMNL00241_000006391 | 41) DMNL00241_000013289 | 62) DMNL00241_000013853 |
| 21) DMNL00241_000010028 | 42) DMNL00241_000013321 | 63) DMNL00241_000013858 |

64) DMNL00241_000013859	75) DMNL00241_000013924	86) DMNL00241_000014199
65) DMNL00241_000013861	76) DMNL00241_000013927	87) DMNL00241_000014204
66) DMNL00241_000013867	77) DMNL00241_000013938	88) DMNL00241_000014205
67) DMNL00241_000013868	78) DMNL00241_000013951	89) DMNL00241_000014232
68) DMNL00241_000013875	79) DMNL00241_000013952	90) DMNL00241_000014237
69) DMNL00241_000013890	80) DMNL00241_000013963	91) DMNL00241_000014275
70) DMNL00241_000013891	81) DMNL00241_000013965	92) DMNL00241_000014311
71) DMNL00241_000013906	82) DMNL00241_000013974	93) DMNL00241_000014312
72) DMNL00241_000013915	83) DMNL00241_000014160	94) DMNL00241_000014317
73) DMNL00241_000013917	84) DMNL00241_000014161	95) DMNL00241_000014323
74) DMNL00241_000013923	85) DMNL00241_000014192	

A copy of the Third Privilege Log with these entries highlighted is attached hereto as Exhibit C.

8. Each of the descriptions for the above listed entries either begins with, or contains in its entirety, some version of the following:

Communication (email chain) regarding this litigation (related to factual investigation of FreeCo) between Plaintiff's counsel and Frank Brostrom, an investigator engaged by Plaintiff to perform investigative tasks in connection with this and other litigation.

9. This language was similarly used in the Second Privilege Log to describe entries DMNL00241_000014321 and DMNL00241_000013497, which were produced on June 15 as NYC_0012552 and NYC_0012543. Copies of NYC_0012552 and NYC_0012543, redacted to obscure the passwords listed therein, are attached hereto as Exhibit D. This language was also used previously used in the Second Privilege Log to describe entry DMNL00241_000006389, which was produced on June 15 as NYC_0012531 and is attached hereto as Exhibit E.

10. The production on June 15 also included a slipsheet reading "DOCUMENT WITHHELD FOR PRIVILEGE," bearing the Bates stamp NYC_0012545. This document appears to have had two attachments, one of which was produced and the other of which has been

replaced with a slip sheet reading “NON-RESPONSIVE DOCUMENT” and bearing the Bates stamp NYC_0012550. Both are attached hereto as Exhibit F.

11. The City appears to have similarly split other “families” of documents by producing some documents within a family while withholding others both as privileged and as nonresponsive. This can be seen in case of the email NYC_0009266, which has a total of 37 attachments, including attachments within attached emails. The first attachment – NYC_0009267 – has been withheld as privileged while attachments 16 through 37 – NYC_0009289 through NYC_0009310 – have been withheld as nonresponsive. Each of the aforementioned Bates stamped documents are attached hereto as Exhibit G.

12. The Third Privilege Log identifies the following 10 emails and email chains between Plaintiff and Vincent Lesnak as being withheld as attorney work product:

- | | | |
|------------------------|------------------------|-------------------------|
| 1) DMNL00241_000006151 | 5) DMNL00241_000006391 | 9) DMNL00241_000013304 |
| 2) DMNL00241_000006159 | 6) DMNL00241_000010315 | 10) DMNL00241_000013986 |
| 3) DMNL00241_000006163 | 7) DMNL00241_000012820 | |
| 4) DMNL00241_000006183 | 8) DMNL00241_000012879 | |

A copy of the Third Privilege Log with these entries highlighted is attached hereto as Exhibit H.

13. The Third Privilege Log identifies the following 13 emails and email chains between Plaintiff and both Vincent Lesnak and Tom Lesnak as being withheld as attorney work product:

- | | | |
|------------------------|-------------------------|-------------------------|
| 1) DMNL00241_000006252 | 6) DMNL00241_000010305 | 11) DMNL00241_000013471 |
| 2) DMNL00241_000006255 | 7) DMNL00241_000012366 | 12) DMNL00241_000013587 |
| 3) DMNL00241_000010199 | 8) DMNL00241_000012465 | 13) DMNL00241_000013858 |
| 4) DMNL00241_000010204 | 9) DMNL00241_000012702 | 14) DMNL00241_000013859 |
| 5) DMNL00241_000010294 | 10) DMNL00241_000013458 | 15) DMNL00241_000013861 |

A copy of the Third Privilege Log with these entries highlighted is attached hereto as Exhibit I.

14. The Third Privilege Log identifies the following 103 emails and email chains between Plaintiff and Frank Brostrom as being withheld as attorney work product:

1) DMNL00241_000006131	30) DMNL00241_000012896	59) DMNL00241_000013868
2) DMNL00241_000006133	31) DMNL00241_000012897	60) DMNL00241_000013875
3) DMNL00241_000006147	32) DMNL00241_000012899	61) DMNL00241_000013890
4) DMNL00241_000006156	33) DMNL00241_000012900	62) DMNL00241_000013891
5) DMNL00241_000006160	34) DMNL00241_000013144	63) DMNL00241_000013906
6) DMNL00241_000006166	35) DMNL00241_000013191	64) DMNL00241_000013915
7) DMNL00241_000006176	36) DMNL00241_000013208	65) DMNL00241_000013917
8) DMNL00241_000006187	37) DMNL00241_000013220	66) DMNL00241_000013922
9) DMNL00241_000006277	38) DMNL00241_000013225	67) DMNL00241_000013923
10) DMNL00241_000006309	39) DMNL00241_000013289	68) DMNL00241_000013924
11) DMNL00241_000006311	40) DMNL00241_000013321	69) DMNL00241_000013927
12) DMNL00241_000006314	41) DMNL00241_000013325	70) DMNL00241_000013938
13) DMNL00241_000006316	42) DMNL00241_000013336	71) DMNL00241_000013949
14) DMNL00241_000006318	43) DMNL00241_000013480	72) DMNL00241_000013951
15) DMNL00241_000006343	44) DMNL00241_000013496	73) DMNL00241_000013952
16) DMNL00241_000006347	45) DMNL00241_000013540	74) DMNL00241_000013955
17) DMNL00241_000006349	46) DMNL00241_000013572	75) DMNL00241_000013958
18) DMNL00241_000006376	47) DMNL00241_000013578	76) DMNL00241_000013963
19) DMNL00241_000006378	48) DMNL00241_000013770	77) DMNL00241_000013965
20) DMNL00241_000010028	49) DMNL00241_000013798	78) DMNL00241_000013970
21) DMNL00241_000010121	50) DMNL00241_000013816	79) DMNL00241_000013974
22) DMNL00241_000010242	51) DMNL00241_000013823	80) DMNL00241_000014160
23) DMNL00241_000010266	52) DMNL00241_000013833	81) DMNL00241_000014161
24) DMNL00241_000010361	53) DMNL00241_000013840	82) DMNL00241_000014166
25) DMNL00241_000010363	54) DMNL00241_000013845	83) DMNL00241_000014190
26) DMNL00241_000012417	55) DMNL00241_000013847	84) DMNL00241_000014192
27) DMNL00241_000012485	56) DMNL00241_000013850	85) DMNL00241_000014194
28) DMNL00241_000012487	57) DMNL00241_000013853	86) DMNL00241_000014196
29) DMNL00241_000012735	58) DMNL00241_000013867	87) DMNL00241_000014199

88) DMNL00241_000014200	94) DMNL00241_000014226	100) DMNL00241_000014311
89) DMNL00241_000014202	95) DMNL00241_000014232	101) DMNL00241_000014312
90) DMNL00241_000014204	96) DMNL00241_000014236	102) DMNL00241_000014317
91) DMNL00241_000014205	97) DMNL00241_000014237	103) DMNL00241_000014323
92) DMNL00241_000014208	98) DMNL00241_000014275	
93) DMNL00241_000014224	99) DMNL00241_000014309	

A copy of the Third Privilege Log with these entries highlighted is attached hereto as Exhibit J.

15. The Third Privilege Log identifies the following eight email chains with Frank Brostrom as including “discussion of Plaintiff’s counsel’s communications with Sebastian Kielmanovich, a federal law enforcement official, regarding a criminal investigation in North Carolina. Those communications were in furtherance of the common interest in the prosecution of cigarette trafficking shared by federal law enforcement and Plaintiff.”

1) DMNL00241_000006147	4) DMNL00241_000006166	7) DMNL00241_000006376
2) DMNL00241_000006160	5) DMNL00241_000006183	8) DMNL00241_000006378
3) DMNL00241_000006156	6) DMNL00241_000012899	

16. On June 16, counsel for Atlantic Dominion and counsel for the City met and conferred by telephone. During the meet and confer, counsel for the City confirmed that Thomas Lesnak had no agreement or contract with the City and was not being compensated by the City.

17. During the meet and confer, counsel for the City additionally represented that –with the exception of the interviews with John Lash, Stephen Riley, Justin Freeman, and Thomas Guglielmo discussed during the same call – the City had not conducted any interviews concerning Atlantic Dominion either directly or indirectly.

18. Attached hereto as Exhibit K is a true and correct copy of the email the City produced as NYC_0008441.

19. The Third Privilege Log lists the following 18 documents authored by Frank Brostrom as withheld as attorney work product with the following description

Investigative report (related to factual investigation of Atlantic Dominion, FreeCo) drafted for purposes of this litigation by Frank Brostrom, an investigator hired by Plaintiff to perform investigative tasks in connection with this and other litigation.

- | | | |
|------------------------|-------------------------|-------------------------|
| 1) DMNL00241_000006278 | 7) DMNL00241_000006350 | 13) DMNL00241_000012488 |
| 2) DMNL00241_000006315 | 8) DMNL00241_000006351 | 14) DMNL00241_000012489 |
| 3) DMNL00241_000006317 | 9) DMNL00241_000010362 | 15) DMNL00241_000014167 |
| 4) DMNL00241_000006319 | 10) DMNL00241_000010364 | 16) DMNL00241_000014201 |
| 5) DMNL00241_000006344 | 11) DMNL00241_000010365 | 17) DMNL00241_000014225 |
| 6) DMNL00241_000006348 | 12) DMNL00241_000012486 | 18) DMNL00241_000014227 |

A copy of the Third Privilege Log with these entries highlighted is attached hereto as Exhibit L.

20. Attached hereto as Exhibit M is a full list of each of the entries within the Third Privilege Log that are at issue in the motion.

21. A copy of the Third Privilege Log with these entries highlighted is attached hereto as Exhibit N.

Dated: New York, New York
July 7, 2023

TROUTMAN PEPPER
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